IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray for a rehearing in this cause and a reconsideration of this Court's opinion of February 9, 1953. In support of this petition, petitioners state to the Court as follows:

INTRODUCTION.

Because the decision of this Court has the highest precedent value, its impact in the fields of evidence, conspiracy, and trial tactics is sweeping. New and hitherto unthought

of rules of law have been adopted which revolutionize the entire concept of criminal responsibility and make conviction by association a real possibility. While investigating committees have heretofore extensively engaged in such practices, persons judicially accused of crime have until now always been secure in their belief that they could never be convicted by evidence of acts neither performed nor authorized by them. This decision, unless reconsidered, destroys that basic idea which has always clothed our criminal jurisprudence. Under the opinion of this Court in this case one charged with participating in a conspiracy may now be convicted by evidence of acts performed by another alleged conspirator after the termination of the conspiracy, merely upon a showing that the acts of the other were relevant in some respect to the conspiracy. In announcing this rule, this Court has overruled its own pronouncements to the contrary, repeated time and time again in over a hundred years of its history, and it has ignored or abandoned the further rule that evidence to be admitted must be not only relevant but also competent.

Unless this rule is reconsidered, startling changes in the admission of evidence have been authorized, proving that bad cases indeed do make bad law. Thus, where one is charged with having been associated in crime with another he will have admitted against him, merely because it is relevant, the flight, escape, or attempted suicide of that other person. By the same token he may be adjudged guilty because of the introduction of evidence that the one with whom he is charged with having associated in crime bribed, influenced, or intimidated a witness, juror, or prosecutor. He may find himself in prison because that other person destroyed or fabricated evidence. Proof that his associate committed like or similar crimes also under the rule announced by this Court will become admissible

against him. All of these matters are clearly relevant, but in the past have been limited to the one doing the act. This decision now opens wide the door so as to bind by these acts all persons charged with association in the common enterprise.

Further, this Court has affirmed these convictions upon a theory of the case never advanced by the government below and never considered by the jury, the trial court, or the Court of Appeals. The theory upon which petitioners were tried and under which evidence was admitted against them would here require a reversal. Nevertheless, if this decision is not reconsidered, petitioners must serve two years in prison for the commission of an offence never passed upon by the jury convicting them, and against which they never interposed a defense because of their reliance upon the failure of the government properly to prove the case against them in the setting adopted by the government and the trial court. This is entrapment of the worst sort and offends against every concept of due process.

Finally, the jury was instructed that the conspiracy continued up to the date of the indictment. This Court's decision, however, announced that the conspiracy terminated two and one-half years earlier. Consequently, the jury, under the instructions given it, could have found petitioners guilty on a finding of "overt acts", which, although charged in the indictment, this Court has found not to be in furtherance of the conspiracy.

Petitioners realize that petitions for rehearing are rarely granted; yet here, because of the widespread consequences which must follow this decision, they fervently hope that this Court, in its role of final dispenser of justice, will see fit to close the Pandora's box which this case has opened.

I.

FOR PURPOSES OF THEIR ADMISSIBILITY INTO EVIDENCE POST-CONSPIRACY ACTS ARE NOT DISTINGUISHABLE FROM POST-CONSPIRACY DECLARATIONS. SUCH ACTS AND SUCH DECLARATIONS ARE INCOMPETENT AS TO ABSENT CONSPIRATORS SINCE NOT AUTHORIZED.

The handling of petitioners' objection to the general admission of acts and declarations after the termination of the conspiracy—by the government, by the trial court, and by the Court of Appeals—constitutes a remarkable example of legal broken field running. At the trial, relying upon the charge in the indictment of a subsidiary conspiracy to conceal, the government offered evidence of acts and declarations occurring after December 5, 1947. The trial court admitted much of this evidence against all the defendants on the theory, advanced by the government, that it was in furtherance of the alleged conspiracy to conceal the commission of the crime (see, *e. g.*, R. 66-67). Neither the government prosecutor nor the court, however, questioned the general rule prohibiting the admission against all conspirators of acts and declarations occurring after the termination of the conspiracy. Both the prosecutor and the court, impliedly conceding the rule, avoided its application by finding that the conspiracy had not terminated.

On appeal to the Court of Appeals, the conspiracy to conceal theory was quietly dropped by both the government and the court. The government there argued that since the conspiracy contemplated the procurement of divorces after the entry into the country, the conspiracy continued until those divorces had been obtained (Gov't Br., Ct. of App., pp. 38-40; Answer to Pet. for Rehearing, Ct. of App., pp. 19-20). But the Court of Appeals de-

clined to adhere either to the "conspiracy to conceal" theory or the "conspiracy to obtain divorces" theory. Rather it stated a quite different reason for upholding the admission of such post-conspiracy evidence, without in any way questioning the rule prohibiting the admission generally of post-conspiracy acts as well as declarations. The Court of Appeals wrote (R. 399):

> Complaint is made that the court permitted evidence of events in America subsequent to the entries. When we remember that this case turned almost entirely upon the question of the validity of the Parisian marriages and that whether they were valid, in turn, depended upon the intent of the parties at the time the ceremonies occurred, it is clear that not only what was said and done prior to the time of the marriages, but that *the conduct of the parties and their statements after they returned to America* were relevant and competent for the jury to consider in determining whether in fact they reflected *an intent to have performed valid marriages or whether they tended to show that the intent was merely to pretend to be married.* (Emphasis added.)

In its Brief in Opposition to the Petition for a Writ of Certiorari, however, the government did not seek to defend the Court of Appeals' intent theory. Rather it reverted to the conspiracy to conceal the crime charge of the indictment, emphasizing that the case differed from *Krulewitch* v. *United States*, 336 U. S. 440 (1949), in that the conspiracy to conceal was charged here while only implied there. It also argued that the conspiracy included an agreement on the part of the husbands and wives to live apart after they came to the United States (pp. 19-22). In its main Brief (pp. 36-42), the government advanced the additional contention that the prohibition against post-conspiracy evidence applied to declarations only, and not to acts. *This was the first time that any such distinction*

between acts and declarations had been advanced: the prosecutor in the trial court, the trial judge, the government in the Court of Appeals, and the Court of Appeals in two opinions never once questioned the basic rule announced in *Logan* v. *United States*, 144 U. S. 263 (1892). In fact the government in its Brief in Opposition to the Petition for a Writ of Certiorari, while not discussing the rule explicitly, conceded its applicability to both acts and declarations in asserting, at page 22, that "the conspiracy was still operative at the time of all acts or statements of conspirators admitted in evidence against other participants."

Moreover, these varying views disclose that the conspiracy terminated at different times in different courts. In the trial court, there was a continuing conspiracy to conceal. But the Court of Appeals, in adopting the "intent" theory, apparently conceded that the conspiracy terminated at the date of last entry. The government, of course, despite some shift in emphasis, always asserted that the conspiracy continued beyond December 5, 1947. Thus, in the one respect in which it has been consistent, the government has been consistently wrong. For this Court's opinion now finally decides, as petitioners have contended in all courts, that the conspiracy ended on December 5, 1947. This Court announces a new basis for the general admission of post-conspiracy acts, however, and finds that the admission of one post-conspiracy declaration against all is harmless error. Thus as to declarations, at least, this Court declines to adhere to the view of the Court of Appeals. And as appears below, *this Court's reasoning goes far beyond anything announced by the courts or contended by the government below: it holds that post-conspiracy acts, if relevant, are admissible generally—against actor and non-actor alike.*

A.

In determining that the conspiracy ended on December 5, 1947, the date of entry into the United States of the third alien, Leopold Knoll, this Court rejects the contention advanced by the government, and spelled out in the indictment, that there was a subsidiary conspiracy to conceal the conspiracy which continued beyond December 5, 1947, since, although alleged, such a conspiracy was not proved. Consequently, the acts and declarations of the conspirators after that date could not be admitted into evidence generally against all conspirators on the theory that they were in furtherance of the subsidiary conspiracy to conceal.

Nonetheless the Court concludes that acts taking place after December 5, 1947 were properly admitted against all the conspirators, insofar as they were "relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies * * *" (Op. p. 13). Or, as the Court expresses it in the following paragraph, these acts were "relevant to prove the conspiracy * * *" (Op. p. 14).

To reach this conclusion the Court draws a sharp distinction between acts and declarations. Declarations, being subject to a hearsay objection, are, according to the Court, only admissible against a co-conspirator when in furtherance of the conspiracy. This Court thus recognizes that such declarations must be competent as well as relevant. Yet apparently competency is not to be considered where post-conspiracy acts are under scrutiny, since this Court states that the cases dealing with declarations, such as *Krulewitch* v. *United States*, 336 U. S. 440 (1949), and *Fiswick* v. *United States*, 329 U. S. 221 (1946), have "no application to acts of a conspirator or others which were relevant to prove the conspiracy." The Court then

indicates that the language in *Logan* v. *United States*, 144 U. S. 263, 309 (1892), which refers to both acts and declarations as being covered by the rule is dictum, which "overlooks the fact that the objection to the declarations is that they are hearsay. This reason is not applicable to acts which are not intended to be a means of expression."

If is submitted that the Court, in thus distinguishing between acts and declarations, has misconceived the rule excluding such evidence against absent co-conspirators after the termination of the conspiracy and has, in effect, overruled more than a hundred years of settled law, repeatedly announced by this and other federal courts, and as so understood applied in numerous cases.

B.

Preliminarily, it is necessary to emphasize that in a conspiracy trial, despite the form in which the indictment is drawn, each alleged conspirator is on trial as an individual. His guilt or innocence is to be determined by the evidence as to him. If the jury is not convinced that such evidence implicates him, he is entitled to an acquittal. Whether a defendant entered into any illegal agreement is to be decided solely from what he said and did—never from what someone else said and did.

As a general proposition, the declarations of a defendant constitute admissible evidence as against him. Whether or not there is a hearsay objection to the introduction of such declarations depends upon the manner in which they are sought to be proved. But once they are admitted against the declarer, the further question which arises in a conspiracy trial is whether such declarations may properly be admitted as against one or more co-defendants.

That question does not pose any hearsay problem. Rather it presents a straight-forward question of authority. For, quite obviously, whether what conspirator A has said, which is in evidence against A, may also go into evidence against conspirator B depends upon whether there is anything to indicate that B *authorized* A to make such a statement. This, then, is the significance of the formulation "in furtherance of the conspiracy." For if A and B, along with others, have agreed to a program of action in such a fashion as to bring a conspiracy into being, then A, B, and each of the others have mutually authorized each other to carry out the scheme. What A then says, in furtherance of the scheme, he says as the agent for the others, and at the trial what A said constitutes competent evidence against B and the others, as well as against A, the declarer.

Thus to get A's declaration into evidence against B, two determinations must be made; *first*, it is necessary to conclude that the declaration is admissible against A; and *second*, once it is held to be admissible against A, it is necessary to find that a conspiracy existed and that the declaration was in furtherance of it, since under those circumstances it follows that B authorized A to say what he did or, put another way, that A made the statement as the agent for B, thus making the statement competent. Analyzed in this fashion, it is plain that any hearsay objection can arise at the first stage only, that is, when nothing but the admissibility of the statement against the declarer is involved. At the second stage, the question involves a problem of the law of agency. At that stage it has absolutely nothing to do with hearsay.

It likewise appears, from this analysis of the matter, that in determining the problem at the second stage, *i.e.*, whether what A said is competent as against B, the considera-

tions are identical regardless of whether the evidence offered is A's declaration or A's act. For, the hearsay problem, if any, having been resolved at the first stage, *the subsequent determination relates solely to A's authority to act or speak for B.* Depending upon the nature of the charge, therefore, the problem is: Was A the agent for B and was he acting in the course of his agency in saying or doing what he did? Or were A and B co-conspirators and was what A said or did in furtherance of the conspiracy? Thus in an agency case the basis of a ruling that the evidence as to A, the agent, may be admitted against B, the principal, is the determination that the action or statement was "within the scope of the agent's authority", while in a conspiracy case the same problem is formulated in terms of whether the action or statement was "in furtherance of the conspiracy." Apart from the difference in language, however, the problems and their solutions are identical.

C.

The text-writers, both in this country and in England, have analyzed and discussed the problem in this fashion, and so has this Court and numerous lower federal courts. The coupling of "acts" *and* "declarations" in these texts and decisions overlooks nothing; rather it involves giving proper recognition to the fact that the basic problem relates to the law of principal and agent. In fact, the definition of a conspiracy as "a partnership in crime" is sufficient, without more, to reveal that the underlying issues of relationship and authority are problems of agency. The following authorities are typical:

Underhill, *Criminal Evidence* (3d ed. 1923), § 718, pp. 961-63:

> When men are associated for a common purpose, and with a common object in view, the law, presuming

that the benefits, if any, which may ensue from their accomplishment will be shared by all, impresses upon the conspirators or partners, collectively, the attribute of individuality so far as the common design is concerned. No member of the combination will be permitted to escape the consequences of the actions or words of his associates. Such acts and declarations are also admissible on the grounds of agency. *But the acts and declarations in order to be admissible must have been made in furtherance of the common design or must accompany and explain such act or declaration. Acts and declarations which do not relate to the conspiracy or which are not in furtherance thereof are not admissible over objection.* (Emphasis added.)

Phipson, *The Law of Evidence* (8th ed. 1942), p. 89:

So, acts and declarations *after* the event conspired for has happened, are not generally receivable, since these cannot be in furtherance of the common purpose.

Wigmore, *Evidence* (Vol. IV), § 1079, pp. 130-31:

The tests therefore are the same, whether that which is offered is the act or the admission of the co-conspirator; in other words, the question is purely one of criminal law, or of conspiracy as affecting joint civil liability, and its solution is not to be sought in any principle of Evidence. (Emphasis added.)

See also, to the same effect, Greenleaf, *Law of Evidence* (1897) Vol. I, § 111, pp. 174-77; Stephen, *A Digest of the Law of Evidence* (Fourth Eng. ed 1892), Art. 4 (Acts of Conspirators), pp. 10-11.

The language "acts and declarations" has been used many times by this Court and in fact appears to be a formulation developed from Mr. Justice Story's opinion in *United States* v. *Gooding*, 12 Wheat. 460 (1827). The problem there had to do with evidence as to declarations of the master of a ship which were sought to be introduced against the ship-owner, who was on trial for viola-

tion of the slave trade act. In answering the problem posed by the offered evidence, Mr. Justice Story wrote as follows, at page 469:

> Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown, that the agent has the authority, and that the act is within its scope; but these being conceded, or proved, either by the course of business, or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants, or idiots, employed to administer poison. The proof of the command, or procurement, may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency. *So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise is considered the act of all, and is evidence against all.* Each is deemed to consent to, or command, what is done by any other in furtherance of the common object. (Emphasis added.)

In applying this decision in *American Fur Company* v. *United States*, 2 Pet. 358 (1829), Mr. Justice Washington wrote, at page 364:

> The principle asserted in the decision of that point, and applied to the case was, that *whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal*; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal. (Emphasis added.)

In *Logan* v. *United States*, 144 U. S. 263, 309 (1892), Mr. Justice Gray, when stating the rule which this Court finds overlooks the hearsay objection to declarations, cites the *Gooding* case. Mr. Justice Jackson, in *Brown* v. *United States*, 150 U. S. 93, 98 (1893), likewise uses the formulation "acts and declarations", citing Mr. Justice Gray's opinion in the *Logan* case, in addition to other authorities. In *Wiborg* v. *United States*, 163 U. S. 631, 657 (1896), Mr. Chief Justice Fuller states the rule as announced by Mr. Justice Washington in the *American Fur Company* case. And more recently, in *Fiswick* v. *United States*, 329 U. S. 211 (1946), where the problem had to do with statements, Mr. Justice Doulgas announced the rule as follows, at page 217:

> *While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking,* Pinkerton v. United States * * * *all such responsibility is at an end when the conspiracy ends.* Logan v. United States, 144 U. S. 263, 309. * * * Brown v. United States, 150 U. S. 93, 98. * * * (Emphasis added.)

See also the language used by Mr. Justice Brown in *Bannon* v. *United States*, 156 U. S. 464, 469 (1895), and by Mr. Justice Brewer in *Clune* v. *United States*, 159 U. S. 590, 593 (1895). And cf. *Queen* v. *Blake and Tye*, 6 Q. B. 126 (1844).

The lower federal courts, citing one or more of these Supreme Court opinions, have likewise adhered to the formulation "acts and declarations", and their decisions are indicative of a consistent recognition that the problem is one of agency. For example, see *United States* v. *Gardiner*, Fed. Cas. No. 15,186a, 25 Fed. Cas. 1245, 1252 (C. C. D. C. 1853); *Heard* v. *United States*, 255 Fed. 829, 834 (C. A. 8th, 1919); *Merrill* v. *United States*, 40 F. 2d 315, 316 (C. A. 5th, 1930); *Minner* v. *United States*, 57 F.

2d 506, 511 (C. A. 10th, 1932). In *United States* v. *Lekacos*, 151 F. 2d 170 (C. A. 2d 1945), rev'd *sub nom. Kotteakos* v. *United States*, 328 U. S. 440 (1946), Judge Learned Hand wrote, at page 172:

> The acts and declarations of confederates, past or future, are never *competent* against a party except in so far as they are steps in furtherance of a purpose common to him and them. *Declarations are no different from other acts; they become competent only when they are uttered in order to accomplish the common purpose.* (Emphasis added.)

The same view is apparent in the opinion in *Sabbatino* v. *United States*, 298 Fed. 409 (C. A. 2d 1924), where Sabbatino claimed that the evidence did not connect him sufficiently with the others to justify finding that he was a conspirator. His contention was that most of the evidence against him related to his acts after the conspiracy, to bribe federal prohibition officers, had terminated. In affirming, Judge Hough wrote, at page 412:

> Under this head of argument the well-known doctrine of the Logan Case, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, is invoked. The decision does not apply here, for, admitting fully that the acts or declarations of one conspirator, made after the conspirator has ended, are not admissible against the other conspirators, and admitting (but not holding) that many, if not most, of the acts of Ralph Sabbatino given in evidence occurred after the conspiracy had ended, it remains untrue that a conspirator may not be convicted by his own acts, no matter when those acts occurred. *The prohibition is against affecting the plurality by the acts of one, committed after the scheme has terminated either in success or failure*; but the one always remains affected by his own acts. That is the inexorable law of all life. (Emphasis added.)

In *Giordano* v. *United States*, 9 F. 2d 830 (C. A. 2d 1925), which involved a conspiracy to bring aliens into the United

States in violation of the immigration laws, evidence was admitted generally with regard to a repayment of money by one of the conspirators to one of the aliens after the termination of the conspiracy. The court held that this evidence was improperly admitted in view of the rule of the *Gooding, Logan,* and *Brown* cases. Since only one act was involved, however, the court ruled that the error was non-prejudicial.

Acts before a conspiracy is formed are likewise inadmissible generally, since obviously not in furtherance of the conspiracy. Thus in *Morrow* v. *United States,* 11 F. 2d 256 (C. A. 8th, 1926), the court reversed convictions for conspiracy to violate the bankruptcy act because certain financial transactions of one of the conspirators were admitted into evidence generally even though they had taken place several months prior to the time fixed in the indictment as the commencement of the conspiracy. In announcing the rule to be applied, Judge Kenyon cited the *Brown* and *Logan* decisions, along with many others. In a similar case, the same court, again through Judge Kenyon, reached the same result. *Gerson* v. *United States,* 25 F. 2d 49 (C. A. 8th, 1928). And see *Miller* v. *United States,* 133 Fed. 337, 353 (C. A. 8th, 1904); *Wilson* v. *United States,* 109 F. 2d 895, 896 (C. A. 6th, 1940).

Moreover, the decisions cited above make it abundantly clear that evidence of acts offered against all conspirators becomes *competent* against all because, *and only because,* the acts are held to be in furtherance of the conspiracy, and they invariably assume that acts committed either before or after the period involved in the conspiracy cannot be in furtherance of the conspiracy. In this connection, the following additional decisions are in point: *Hitchman Coal & Coke Co.,* 245 U. S. 229, 249 (1917); where in holding that certain acts and declarations "in furtherance of

the common object" were admissible against the defendants, Mr. Justice Pitney observed that the rule admitting such evidence against defendants other than the actors or declarers "originated in the law of partnership"; *Pinkerton* v. *United States*, 328 U. S. 640, 645-48 (1946); *Murphy* v. *United States*, 285 Fed. 801, 815 (C. A. 7th, 1923); *United States* v. *Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 969-73 (S. D. Calif. 1942).

D.

This Court cites no authority whatsoever for its view that acts stand on a different footing from declarations. And for its assertion that acts which are relevant to prove the conspiracy are admissible "even though they might have occurred after the conspiracy ended", it cites, in addition to the *Rubenstein* case, only *Fitzpatrick* v. *United States*, 178 U. S. 304 (1900), and *Ferris* v. *United States*, 40 F. 2d 837 (C. A. 9th, 1930). But the language of Mr. Justice Brown in the *Fitzpatrick* case, at pages 312-13, emphasized that to constitute competent evidence for the jury the facts offered must be "part of the whole transaction" * * * "occurring at any time *before the incident was closed*" * * * or taking place from the time the crime "was first contemplated *to the time the transaction was closed.*" (Emphasis added.) Likewise in the *Ferris* case, in which evidence as to the conduct of two defendants after their arrest was admitted against other conspirators, the appellants, the court concluded, at page 839, that the conspiracy *had not terminated* at the time of the arrest of those two defendants but "continued until the arrest of appellants." Yet here, even though this Court determines that "on this record * * * the conspiracy ended December 5, 1947," numerous acts taking place as long as two-and-a-half years after that date are held to be admissible against absent conspirators.

Nor can this holding rest upon *United States* v. *Rubenstein*, 151 F. 2d 915, 917 (C. A. 2d, 1945). For there the evidence was admitted in order to *corroborate* the testimony of the spouses as to what they had originally intended and agreed upon. Here, however, three marriages are involved, and the acts of all six parties to those marriages after entry —and after termination of the conspiracy—were admitted generally, even though only one party to one marriage, Bessie Osborne, had testified adversely on the question of her and Munio Knoll's intent in getting married. Thus there was only one marriage with respect to which there was any spousal testimony indicating lack of proper marital intent to be corroborated. As a matter of fact, the testimony of Grace Knoll was to the effect that she and Leopold Knoll intended to be married in the fullest sense of the word; and so did the testimony of Maria Lutwak concerning her marriage to Marcel. Evidence of the acts of the parties to those two marriages after the termination of the conspiracy thus did not and could not corroborate spousal testimony showing lack of intent.

In addition, this Court has overlooked petitioners' argument that in any event the acts occurring after the conspiracy were not relevant as to those who took no part in them (Pet. Reply Br., p. 6). Thus, even under the Court's reasoning here, such acts should have been limited to those defendants performing them.

II.

THE BASIC ELEMENT UNDERLYING PETITIONERS' CONVICTIONS BY THE JURY WAS THE ASSERTED INVALIDITY OF THE MARRIAGES. HENCE THE NATURE OF THE MARRIAGES WAS MOST MATERIAL. THE GOVERNMENT FAILED TO PROVE INVALIDITY, AND CONGRESS IN ENACTING THE WAR BRIDES ACT DID NOT INTEND TO EXCLUDE THOSE VALIDLY MARRIED.

The case in the trial court turned on the question as to whether the marriages were invalid. It was submitted to the jury on that theory and the trial court instructed extensively on that point (R. 338-340). An examination of the instructions indicates beyond question that the jury could not have found petitioners guilty without deciding that the marriages were invalid. Because of the adherence of the trial court to the theory that the invalidity of the marriages was the core of the case and because that invalidity had not been proved by the law of the place where they occurred, the trial court indulged in the "assumption" that "the law of Paris, France" is the same as that of Chicago, Illinois (R. 189).

The Court of Appeals also adopted this theory of the case, stating that "if valid marriages came into being the fact that the motives back of them were entries into this country would be wholly immaterial" (R. 392), and "before the jury could properly conclude that the scheme became an alleged conspiracy, it was necessary that the evidence be sufficient to justify the conclusion that the three marriages were void—of no legal effect—and that they were so intended, for, if they were valid, the government cannot complain" (R. 393), and "we are confronted, then, with the crucial question of whether the evidence justifying a finding that the so-called marriages were void" (R. 395-396). In order to overcome the failure of the government

to prove invalidity by French law, the Court of Appeals also engaged in the erroneous presumption that the marriage laws of a foreign country are presumed to be the same as those "obtaining in the forum" (R. 414). That court based its decision on the ground that the marriages were sham and void under the law of his country (R. 396).

In this Court, the government abandoned the theory upon which the case was tried and submitted to the jury and argued here for the first time that the validity of the marriages in question was immaterial (Gov't Br., pp. 66-75). This Court has apparently accepted that view (Op., pp. 7-8), although it refers to the marriages between the parties as "pretended marriage ceremonies" (Op., p. 5), "spurious, phony marriages (Op., p. 5), "fake marriages" (Op., p. 7) and "ostensible marriages" (Op., p. 9). This Court's inconsistency in stating that it does "not believe that the validity of the marriages is material" (Op., p. 7) is clearly demonstrated by its later statement that "the *essential fact* of the conspiracy was the existence of *phony marriage ceremonies* entered into for the sole purpose of deceiving the immigration authorities and perpetrating a fraud upon the United States" (Emphasis added) (Op., p. 13).

Apart from this, however, since this Court has found ample evidence of a conspiracy to defraud the government, it is obvious that under the charge in the indictment petitioners must have schemed to accomplish their purpose either by misrepresenting that there were valid marriages or by concealing the true nature of the marital relationships, or both. Under that charge the misrepresentation or the omission to disclose could have arisen only in connection with the execution of applications for admission to the United States by the aliens—Maria, Munio, and Leopold (Gov't Exs. 1, 2, and 3). The application of Munio

Knoll—Zygmunt Roman-Kiewicz—Exhibit No. 2, is appended to this petition. The other applications are similar in all respects.

The making of such applications was required by a regulation issued by the Commissioner of Immigration and Naturalization. Title 8, U. S. C. A. § 222; 8 Code of Fed. Reg., 1949 Supp., Part 126, pp. 90, *et seq.* The regulation had the force and effect of law. *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C. A. 2d, 1950); *Hamburg-American Line* v. *United States*, 65 F. 2d 369 (C. A. 2d, 1933). By that regulation and the application forms which were issued under it, that which was material to entry was defined.

An examination of the applications indicates that the aliens made claim that they were non-quota immigrants under the provisions of the War Brides Act. In support of their claim they were required to state that they were married to honorably-discharged veterans of World War II. In addition, they acknowledged that all excludable classes of aliens had been explained to them and that they were not members of any such class. The excludable classes set forth on the application forms did not refer in any way to an alien contracting a marriage for the sole purpose of securing entry.

The three aliens answered fully all inquiries put to them by the applications, stating they were married to veterans, the dates and places where the marriages took place, and the military and discharge status of their spouses. The application forms prepared by the United States Department of Justice asked for those facts *and nothing more.*

Having given the government the facts it demanded, were the aliens nonetheless required to state something additional, particularly in view of the fact that a long list of excludable classes had been recited to them? And if

they had stated their intentions to separate from their spouses upon entry, could they have been excluded under any law of the United States?

If there was a duty upon the aliens to speak further it arises only from the construction of the War Brides Act by this Court to the effect that when Congress used the words "alien spouse" it referred to one of "two parties who have undertaken to establish a life together and assume certain duties and obligations" (Op., p. 7). Thus this Court now contends, by reason of its affirmance of the convictions below, that these three aliens in Paris, France in 1947 should have known what this Court in 1953 says Congress must have intended in passing the Act, in the absence of any evidence of such intent, and even though three Justices cannot agree with that interpretation.

Conceding, *arguendo*, the intent of petitioners to enter into marriages for the sole purpose of securing entry into this country, and conceding further their intention to separate upon arrival, the record is completely empty of any evidence of their intent to conceal this information from the immigration authorities. Thus, even if there be a concealment, there could be no fraud upon the government since the intent to conceal was never proven.

In interpreting the Congressional intent underlying the War Brides Act, this Court made no reference to the source material from which such intent is usually ascertained. As a matter of fact, there was no need for this Court to consider what Congress had in mind when it passed the War Brides Act, since the statute is completely unambiguous. *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98 (1937); *United States* v. *Corbett*, 215 U. S. 233 (1909). The word "spouses" in the Act is clear and conclusive and can only mean persons legally wedded.

But even if the intent underlying the War Brides Act is

to be considered, this Court's conclusion is insupportable under familiar principles of statutory interpretation. In the first place, it is evident that Congress, in passing this Act, intended to *expedite* the procedures by which alien husbands and wives of veterans of World War II could enter this country. And that was all, for prior to the passage of that Act, Congress had made provision for the entry of such spouses. Thus a citizen of the United States, by filing a petition under Title 8, U. S. C. A., § 209 (b), could obtain the entry of an alien wife, no matter when they were married, and of an alien husband, if married prior to July 1, 1932, as non-quota immigrants. Title 8, U. S. C. A., § 204 (a). Alien husbands married to citizen wives after July 1, 1932 could be admitted under the same procedure as preference-quota immigrants. Title 8, U. S. C. A., § 206 (a) (1) (A).

In setting forth those eligible to enter as above, Congress referred to them as "the wife or the husband of a citizen of the United States", Title 8, U. S. C. A., § 204 (a), and "the husbands of citizens of the United States by marriages occurring on or after July 1, 1932," Title 8, U. S. C. A., § 206 (a) (1) (A). Moreover, in cases arising under those statutes the courts have always determined whether one is a husband or a wife by referring to the law of the place where the marriage was contracted. *Consulich Societa Di Navigazion* v. *Elting*, 66 F. 2d 534 (C. A. 2d, 1933); *Ex parte Soucek*, 101 F. 2d 405 (C. A. 7th, 1939). Even the case of *United States* v. *Rubenstein*, 151 F. 2d 915 (C. A. 8d, 1945), cited by this Court against petitioners, stands for this proposition, since the marriage there was ruled invalid in the light of the law of New Jersey, the place where the marriage occurred.

Further, in 1937, Congress passed a statute which provided that a non-quota or preference-quota alien, who had been admitted on the representation that he was married

to a citizen but who subsequently secured a judicial annulment of such marriage retroactive to the date of its celebration, was to be deported on the ground that, because of fraud, he was not entitled to admission when he arrived in the United States. Title 8, U. S. C. A., § 213 (a). Thus the cases cited by petitioners (Pet. Br., p. 47), holding that an annulment would not be granted under the circumstances of this case are indeed most material.

In passing the War Brides Act, Congress is presumed to have had in mind prior legislation on the same subject, as well as judicial decisions construing that legislation. The War Brides Act should be construed in the light of the prior statutes and decisions. *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 386 (1934).

When this rule of statutory construction is applied it follows that Congress, in enacting the War Brides Act, must have intended that all those validly married by the law of the countries where the marriages took place were admissible except where an annulment relating back to the date of marriage was secured. If this is so, there could here have been no concealment of a material fact, since petitioners fully stated to the immigration authorities all that Congress required them to state. In addition it is pointed out that even now under the new Immigration Act, Title 8, U. S. C. A., § 1251(c), Congress has not gone as far as this Court but has made deportable only one who is divorced within two years after securing entry by virtue of a marriage, unless the Attorney General is satisfied that such marriage was not contracted for the purpose of evading the immigration laws. In this case no divorce took place within two years of entry.

Further, an extensive search of the statutes indicates no legislation by virtue of which the aliens here could have been excluded if they had fully stated to the immigration authorities their intention subsequently to secure divorces,

if the marriages were in fact valid. If they were invalid, then this Court is faced with determining the question of the necessity of proving invalidity by French law, a question which it has avoided answering.

The case of *United States* v. *Rubenstein*, 151 F. 2d 915 (C. A. 2d 1945), relied upon by this Court as supporting its view (Op., p. 8) is distinguishable. In that case, the alien entered by virtue of a petition filed by a citizen of the United States pursuant to Title 8, U. S. C. A., § 204. Under the terms of that statute the citizen was expressly required to state that he would be responsible for the support of his wife. Title 8, U. S. C. A., § 209(b)(6). This was not so in the applications here. The court there found that the omission to state that the parties intended to obtain a divorce amounted to the concealment of a fact which was material to the admission of the alien, because it related to the statement concerning support of the alien after entry. As stated above, the decision was further buttressed by a finding by that court that the marriage itself was invalid, based upon an application of the law of New Jersey.

III.

PETITIONERS HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW AND THEIR RIGHT TO A TRIAL BY JURY IN THE FOLLOWING RESPECTS:

THE ADMISSION OF POST-CONSPIRACY ACTS IN THE TRIAL COURT WAS UPON A BASIS ENTIRELY DIFFERENT FROM THAT FOR THE FIRST TIME ANNOUNCED BY THIS COURT.

THE TERMINATION OF THE CONSPIRACY ON DECEMBER 5, 1947 INEVITABLY INVALIDATES A SUBSTANTIAL PORTION OF THE TRIAL JUDGE'S CHARGE TO THE JURY.

THE THEORY OF THE OFFENSE STATED IN THIS COURT'S OPINION IS NOT THE SAME AS THAT UPON WHICH THE JURY WAS INSTRUCTED AND THE CASE SUBMITTED.

The manner in which this case has progressed through the courts—spawning new rules at one stage and repudiating them at the next, changing character so as better to avoid awkward legal principles, transforming the question around which the contest in the trial court entirely centered into an issue "not material" (Op., p. 7), and rendering surplusage the lengthy instructions given the jury as to the validity of the marriages, with the government altering its views and arguments in each succeeding brief—raises a serious question as to whether or not defendants, confronted by such shifts and turns, can in any real sense be said to have had a fair trial. After all, the defense of persons under criminal indictment should not degenerate into a guessing game, in which defendants' counsel are burdened with the impossible task of anticipating at the trial all the theories the government will not advance until appeal, and of deciding what to do on the basis of hunches as to which of the rules of evidence accepted by the government and the trial court for purposes of the trial will be radically altered retroactively by a higher court.

In this case, after a careful analysis of the record in the light of the indictment, the government's presentation of its case, the court's instructions to the jury, and the rules of evidence upon which testimony was admitted, rejected, or limited, counsel for the defendants determined not to present a defense. As stated to the trial court "it has become the conclusion of counsel for defendants jointly that on the present state of the record, we will not put in any defense * * *" (R. 289).

Counsel's decision took into account the following: (1) that the case as presented by the government and as submitted to the jury under the court's instructions raised as a crucial issue the validity of the marriages, and that the misrepresentation the jury was asked to find as an objective of the conspiracy was a misrepresentation as to marital status, *i. e.*, that so-and-so was married when in fact he was not; and (2) that acts and declarations of conspirators taking place after the termination of the conspiracy —which petitioners contended occurred on December 5, 1947—were inadmissible as to absent co-conspirators.

It is obvious that the trial court and the Court of Appeals entertained the same assumptions: they viewed the issues at the trial in the same light as petitioners' counsel, and they acknowledged the rule that acts and declarations are inadmissible against absent co-conspirators if occurring after the termination of the conspiracy. The instructions leave no doubt that the validity or invalidity of the marriages constituted the key issue in the trial court's concept of the case; and the Court of Appeals was most explicit in announcing its agreement (R. 392, 395, 399, 413). And both courts tacitly gave recognition to the rule about acts and declarations after the termination of the conspiracy, while finding novel and different ways of avoiding its application.

A.

As to the rule concerning acts and declarations after the termination of the conspiracy, petitioners' counsel, the trial court, and the Court of Appeals would appear to have been amply justified in relying upon the authoritative statements to be found in numerous decisions and texts. Some of these have already been cited above, and doubtless if counsel had the time to run down all the pertinent authorities, dozens and dozens of other pronouncements of the rule could be found. But more, counsel have been unable to locate any decision or text which announces the rule which this Court has evolved. To the best of counsel's knowledge, there is no expression of such a rule, and the very fact that the government and the trial court resorted to a subsidiary conspiracy to conceal theory and that the Court of Appeals announced an "intent" theory is persuasive indication that what this Court says is now the rule has never before been said to be the rule by any authority. For it would be more than a waste of effort, it would be ridiculous for the government and the lower courts to try so hard to circumvent the post-conspiracy acts and declarations rule if in fact that rule had been what this Court states it to be.

Since this rule has never before been given expression, while the "acts *and* declarations" formulation has been enunciated upon innumerable occasions and rarely if ever questioned, the action of this Court in applying its new rule retroactively has the effect, under the circumstances of this case, of changing the rules under which guilt or innocence is to be found after the trial is over. Had the government urged the rule which this Court now announces at any stage prior to filing its main Brief in this Court—a week before oral argument on December 8, 1952—or had the trial court stated that such was the rule, the

situation would have been quite different. But the prosecutor said nothing whatsoever to suggest that he understood the law the way this Court has now shaped it; nor did the trial court. On the contrary, everything the prosecutor and the trial court did and said indicates beyond all doubt that they thought the rule in *Logan* v. *United States*, 144 U. S. 263 (1892), meant just what it said. For the tactics and arguments of the prosecutor and the comments and rulings of the trial court were directed, not at changing the rule by deleting the word "acts" from its formulation, but at circumventing it on the basis of a charged conspiracy to conceal the crime.

In this connection the opinion of Mr. Justice Cardozo in *Shepard* v. *United States*, 290 U. S. 96 (1933), is very much in point. There evidence was offered and admitted on the theory that it constituted a dying declaration of the defendant's wife indicating her suspicion that her husband had poisoned her, the defendant being charged with her murder. When it appeared in the Court of Appeals that the facts did not warrant admitting this evidence as a dying declaration, the government contended that in any event it was admissible to rebut defense testimony tending to show that the wife had in mind the possibility of committing suicide, since it showed a state of mind inconsistent with the presence of any such thought. The Court of Appeals decided that although inadmissible as a dying declaration the evidence might go in on that newly-suggested ground. This Court reversed, and in the course of his decision Mr. Justice Cardozo wrote, at pages 102-3:

> The testimony was neither offered nor received for the strained and narrow purpose now suggested as legitimate. It was offered and received as proof of a dying declaration. * * * There is no disguise of that purpose by counsel for the Government. They concede in all candor that Mrs. Shepard's accusation

> of her husband, when it was finally let in, was received upon the footing of a dying declaration, and not merely as indicative of the persistence of a will to live. *Beyond question the jury considered it for the broader purpose, as the court intended that they should.* A different situation would be here if we could fairly say in the light of the whole record that the purpose had been left at large, without identifying token. There would then be room for argument that demand should have been made for an explanatory ruling. *Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected.* (Emphasis added.)

Here the reason for admitting much of the post-conspiracy evidence was stated by the trial court in the presence of the jury (R. 67-68), and the jury was reminded of the continuing conspiracy to conceal in the court's instructions (R. 335). Petitioners' counsel unsuccessfully objected that a charge of a conspiracy to conceal violated this Court's decision in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), and although this Court has not repudiated the charging of a conspiracy to conceal, it did hold that no such conspiracy had been proved. Consequently, this Court found that the conspiracy terminated on December 5, 1947.

Thus the post-conspiracy acts could not go into evidence on the trial court's theory. Apparently the Court of Appeals recognized this, but it nonetheless concluded that on the defendants' intent the evidence was proper (R. 399). Offering evidence for the purpose of showing intent is quite different from offering it for the purpose of showing a

subsidiary conspiracy to conceal, and the "intent" rationale expressed by the Court of Appeals was "unavowed and unsuspected" at the trial stage. Likewise, offering evidence for the purpose of showing a conspiracy to commit certain sustantive offenses and to defraud the United States is quite different from offering it for the purpose of showing a subsidiary conspiracy to conceal the principal conspiracy. The new rationale, expressed by this Court for the first time, was equally "unavowed and unsuspected" at the trial.

Moreover, this Court has only in part abandoned the "intent" rationale for the broader "proof of the conspiracy" view, since it considers that post-conspiracy acts "relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies were competent * * *" (Op., p. 13). Thus, insofar as the "intent" theory of the Court of Appeals persists in this Court's decision, evidence improperly admitted on one basis is now considered to have been properly admitted on a much more limited basis. Where evidence is admitted to show intent, the jurors should be so advised in order that they will not erroneously consider it for some other purpose. But since no one even hinted at the trial that the purpose of this evidence was to show intent, defendants had no occasion to ask for an appropriate instruction. The course of the trial put them off guard.

B.

This Court's ruling that the conspiracy terminated on December 5, 1947—a ruling which petitioners' counsel vainly sought in the trial court—when superimposed upon the case works some startling changes, since the indictment, the trial, and the charge to the jury all proceeded upon the view that the conspiracy continued right up to

the date of the indictment. No juror could possibly have suspected that the conspiracy ended on December 5, 1947, for the court instructed the jury as to what the charge was—including the continuation of the conspiracy—and then gave the indictment to the jury to take to the jury-room (R. 333, 335, 343). Thus the only way in which a juryman could have reached the conclusion which this Court now announces as to the termination of the conspiracy was by disregarding what he was told by the trial court he was duty-bound to follow (R. 328).

In addition to the continuing conspiracy to conceal, which this Court finds was not proved, the indictment charged a conspiracy to commit certain offenses and to defraud the government from on or about July 1, 1947 "and continuously thereafter up to and including the date of this indictment * * *" (R. 4), it being part of the conspiracy that after the conspirators had secured the entry of the three aliens "the parties to the aforesaid ostensible marriages would not live together in the United States as man and wife and thereafter would take such legal steps to sever the formal bonds of said ostensible marriages as they saw fit" (R. 6-7).

None of the courts which have considered this case have made any ruling as to the effect or significance of this part of the charge of conspiracy. But adopting this Court's view that "there is no statement in the indictment of a single overt act of concealment that was committed after December 5, 1947, and no substantial evidence of any," the overt acts listed in the indictment as occurring after December 5, 1947 can only be regarded as overt acts in carrying out that part of the conspiracy whereby the parties to the marriages would not live together and would obtain divorces. Thus overt acts Nos. 15 through 21, if they are overt acts in the carrying out of a conspiracy at all, can only be viewed as in furtherance of the con-

spiracy to live separate and apart and to obtain divorces (R. 8-9).

The trial court charged the jury as follows (R. 336-37):

> Your inquiry should be: First, Did the defendants, or some of them, conspire together to do the unlawful acts charged in the indictment? And, second, if they did so inquire, Did they thereafter, *with the view of carrying out the object of such conspiracy, do one thing set forth as an overt act in the indictment towards that end?* If they did so conspire together *and take one or more steps, set forth as overt acts,* toward the accomplishment of that unlawful purpose, the offense of conspiracy is complete, even though the object of the conspiracy is never attained.
>
> You will observe that the Government and the grand jury have, in this indictment, charged many overt acts. An overt act means an act done for the purpose of carrying out the design, the unlawful purpose, and it must be done by one or more members of the conspiracy, if it has been found that there was a conspiracy, and must be of such a character as appears to you to have been done in order to carry out the unlawful purpose. It is not necessary that you find that all of the overt acts charged were performed, *but it is necessary that you find that at least one of the overt acts charged was done, and done with the intent of accomplishing the purpose of the conspiracy,* before you would be warranted in finding the defendants, or any of them, guilty under this conspiracy count. (Emphasis added.)

When these instructions are read together with those in which the court described to the jury the charge in the indictment that as part of the conspiracy the parties, having secured entry, would not live together in the United States and would take such steps as were necessary to sever the bonds of marriage (R. 335), it is apparent that the jury could have found the petitioners guilty of agreeing to obtain divorces after entering the United States, and

that one overt act—perhaps No. 21, Marcel's divorcing Maria—was done with the intent of accomplishing that purpose of the conspiracy. But the conspiracy terminated, this Court has ruled, on December 5, 1947—some two years and four months before Marcel secured his divorce.

It is thus all too obvious that the trial court should have instructed the jury that the conspiracy terminated on December 5, 1947, and that certain of the overt acts charged —Nos. 15 to 21 inclusive—did not constitute overt acts the doing of which would complete the crime of conspiracy, since post-December 5, 1947 acts could not be in furtherance of the conspiracy. But the trial court, adhering to the view of the indictment that the conspiracy continued up to the date of the indictment, did not so instruct the jury. Consequently the jury was told that certain acts could be found to be overt acts which, on this Court's ruling, *could not on any theory constitute overt acts intended to carry out the conspiracy or any part of it.* Cf. *Lonabaugh* v. *United States*, 179 Fed. 476, 479-81 (C. A. 8th, 1910).

Entirely apart from all other considerations, therefore, this Court's finding—correctly in our view—that the conspiracy terminated on December 5, 1947 renders improper, misleading, and erroneous as propositions of law the trial court's charge to the jury as to the scope, purpose, and duration of the conspiracy and its instruction with respect to what acts the jury might find to be the overt act or acts needed to complete the crime. The error thus revealed by this Court's ruling is compounded by the fact that the trial-court turned over the indictment to the jurors to take to the jury-room.

It is elementary that the trial court is under a duty to charge the jury fully and fairly. In stating the law applicable to the facts of the particular case, it must confine

itself to the issues raised by the pleadings and the facts developed at the trial, and it must state the law correctly. Yet while instructions should not go beyond the issues presented, they should cover all of them, and may not ignore any issues in the case which are supported by some evidence. 53 Am. Jur., Trial, §§ 573-81. Cf. *Bird* v. *United States,* 180 U. S. 356, 361 (1901); *Merchants Mutual Insurance Co.* v. *Baring,* 87 U. S. 159 (1874); *Screws* v. *United States,* 325 U. S. 91 (1945); *Morris* v. *United States,* 156 F. 2d 525 (C. A. 9th, 1946); *Samuel* v. *United States,* 169 F. 2d 787 (C. A. 9th, 1948).

Here, however, the jury was instructed that the conspiracy continued up to the date of the indictment. But the conspiracy terminated on December 5, 1947—over two-and-a-half years before the indictment. The jury was instructed that the indictment charged a conspiracy to conceal. The record is undisputed that there was no substantial evidence of any such conspiracy. The jury was instructed that it could find any one of the twenty-one overt acts charged in the indictment as an act in furtherance of the conspiracy and thus having the effect of completing the crime. Seven of the overt acts—since they took place after December 5, 1947—could not as a matter of law constitute overt acts in furtherance of the conspiracy.

Thus this Court, in correctly finding the termination date of the conspiracy, has revealed that, since the trial proceeded upon a quite different view, the jury was instructed erroneously and *in such a manner as to make possible a finding of guilt on a theory of the offense which the December 5, 1947 ruling repudiates.*

C.

But this is not all, for this Court's view that the validity or invalidity of the marriages is immaterial renders utterly pointless the carefully drafted instructions given by the court as to the elements necessary to a valid marriage. Read in its entirety the court's charge to the jury put to the jury—as the principal issue—the question as to whether the three alleged ostensible marriages were valid or invalid. The detailed set of instructions on marriage could have no other purpose (R. 339-40), and both the government (R. 298, 299, 304, 306, 307) and the defendants (R. 340) proffered instructions on the subject.

Thus the jury was asked to pass upon an issue—in its view, understandably, the key issue—which the Court now says is not material. The anomaly is emphasized by the fact that, despite its lengthy charge, the trial court did not instruct the jury at all with respect to what would constitute "the willful concealment of a material fact" or under what circumstances the defendants would be duty-bound to reveal to the immigration and naturalization authorities the facts disclosing their marital intent.

Consequently, if it was not necessary to find that the marriages were invalid—that issue being immaterial—presumably the jury must have found that the defendants conspired to secure entry for the aliens by the willful concealment of material facts. Yet the instructions show that the jury was not instructed as to that issue or told the rules of law applicable to it in any fashion whatsoever, let alone with sufficient clarity to justify an appellate court's conclusion—on the record taken as a whole—that the jury did so find.

Finally, the view that the validity or invalidity of the marriages is immaterial renders altogether pointless In-

struction No. 22, which advised the jury that "The marriage of a man and a woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced, is void" (R. 339, 354). Petitioners have contended all along that this instruction has no application to the case at all. Now, at long last, this Court's decision indicates conclusively that petitioners have been right. For, if there was no need for the jury to conclude that any marriage was void, and if in fact the whole discussion with respect to validity and invalidity is beside the point, then what possible purpose can an instruction such as Instruction No. 22 serve, but to confuse?

D.

Viewed in retrospect, then, in light of this Court's ruling that the conspiracy terminated on December 5, 1947, the trial court's instructions consist in large part of propositions which are either erroneous or utterly out of place. A jury treated to such a quantity of erroneous and irrelevant instruction could hardly be expected to reach a proper verdict, particularly when guidance as to other issues—considered by this Court to be of the greatest importance—was totally lacking from the trial court's charge.

It is a denial of due process to sustain convictions under a concept of the offense different from that which was submitted to the jury. It also amounts to a denial of a jury trial. *Cole* v. *Arkansas*, 333 U. S. 196 (1948); cf. *Virginian Ry. Co.* v. *Mullens*, 271 U. S. 220 (1926); *United States* v. *La Franca*, 282 U. S. 568 (1931).

IV.

THE APPLICATION OF THE OPINION OF THE COURT TO THE FACTS OF THIS CASE REQUIRES REVERSAL OF THE JUDGMENT BELOW AND A NEW TRIAL.

A.

Under the Principles Announced by the Court in This Case, Maria Knoll Was Incompetent to Testify Against Her Husband.

The opinion of the Court states that "Munio Knoll had been married in Poland in 1932 to one Maria Knoll. There is some evidence that Munio and Maria were divorced in 1942 but the existence and validity of this divorce are not determinable from the record" (Op., p. 2). Maria Knoll, called as the second witness on behalf of the government, was the first of the wives to testify. Objection was made to her competency as a witness on the ground that she was married to the defendant Munio Knoll in 1932, and a *voir dire* examination of the witness was requested (R. 41-42, 57).

The objections were overruled (R. 57). Maria was permitted to testify at length as to her marriage to Lutwak and to acts done by her long after the conspiracy terminated (R. 58-92). This evidence was admitted against all.

The opinion of this Court holds that the "ostensible" wives are competent to testify (Op., p. 10), but this Court has not passed on the question of Maria's competency. The record makes clear that she married Munio Knoll in Poland in 1932 and that the government never proved a divorce between them. Since that marriage obviously was not for "the purpose of using [it] in a scheme to defraud" (Op. p. 10), Maria was incompetent to testify against Munio so long as this Court recognizes the prohibition against anti-spousal testimony.

B.

The Record Does Not Support the Conclusion That Grace Knoll Was an "Ostensible" Wife, and Consequently It Was Error to Allow Her to Testify Over the Objection of Her Husband.

Grace Klemtner Knoll was the last of the wives to testify. Bess Osborne, who was the "ostensible" wife of Munio Knoll, had previously testified to a conversation in Paris between Leopold Knoll and Grace Klemtner Knoll at which the witness was present (R. 216). She testified that Leopold Knoll told Grace that "If you do not intend to marry me and stay married to me, and if you have only come over here to marry me for the purpose of getting me into the United States, and if it is for that purpose only, then you go back home, I do not want to marry you."

Grace Knoll testified that her marriage to Leopold was consummated before entry into the United States, that she and her husband had been living together as husband and wife after April 1, 1950, that they were not divorced, and that she intended to continue to live with her husband as his wife. The jury acquitted Grace's husband, Leopold Knoll.

By acquitting Leopold Knoll, the jury necessarily determined that he was not a member of the conspiracy alleged, and also to all intents and purposes that his marriage to Grace was not "ostensible."

In the light of this judicial determination and of the testimony showing the intentions of Leopold and Grace to remain married, the rule announced in the opinion of the Court with respect to "ostensible" wives is not applicable to this marriage. While the Court may have concluded that there was sufficient evidence of the lack of good faith in her marriage to permit Bess Osborne to

testify, the record and the jury's verdict do not permit the conclusion that Grace Knoll was a competent witness.

Hence, it was error to admit the testimony of Grace Knoll over the objection of her husband Leopold Knoll, as against both Leopold Knoll and the other defendants. The error was compounded by calling her as a court's witness, and by asking her questions which required her to plead the privilege against self-incrimination.

C.

The Admission Against the Defendants of Declarations Not in Furtherance of the Conspiracy Was Prejudicial Error.

The opinion of the Court asserts that only one declaration made after the conspiracy ended was admitted against all the alleged conspirators. The Court, however, holds that the error was harmless.

Yet another declaration, made prior to the termination of the conspiracy but not in furtherance of the common design, was also admitted against all of the defendants even though some of them were not present when the declaration was made. (The government contended in its Brief (p. 34 fn. 18) that this declaration was not in fact admitted against all of the conspirators, but government counsel, at the time of oral argument, conceded in conversation with petitioners' counsel that in fact this second declaration was so admitted against all.)

So that the record is perfectly clear, these are the facts concerning that declaration. The record shows (R. 155) that the witness Haberman was asked if he had a conversation with the defendants Munio Knoll and Marcel Lutwak about the defendant Leopold Knoll. He answered, "yes", and then the jury was asked to step out of the

room before the witness related the conversation. Haberman then said, out of the presence of the jury (R. 155):

> By the Witness: Mr. Munio Knoll told me the reason he was in New York was because he was expecting his brother from Europe, and Mr. Marcel Lutwak said he probably will arrive the following day and will be able to stay in Chicago. Then Mr. Munio Knoll said to me, "Well, you see how easy it is if you know how to come to the United States."

Defense counsel objected that this conversation was not in furtherance of the conspiracy charged and was therefore not admissable against the other defendants (R. 155-60). Thereupon the court overruled the objection (R. 160), and in the presence of the jury, Haberman testified (R. 160):

> Q. Will you relate the conversation?
>
> A. Mr. Munio Knoll told me that the purpose for his stay in New York was because he was expecting the arrival of his brother Leopold, and Mr. Marcel Lutwak remarked that they had been expecting him for two days now, and he hadn't arrived, and if he did not arrive by tomorrow, which would be Wednesday, he would have to go back for business reasons to Chicago.
>
> Q. Was there anything else said at that particular time about the matter?
>
> A. No. The only thing that was said is that when Mr. Munio Knoll mentioned about his brother coming, he says, "*You see how easy it is to come to the United States if you know how.*"

This conversation was not properly admitted against the defendant Regina Treitler since the italicized portion was not in furtherance of the conspiracy.

Government Exhibit No. 19 is a certified copy of the divorce decree terminating the marriage of Maria and Marcel Lutwak. This decree was obtained long after the conspiracy ended. A certified copy of it was admitted

against all of the defendants over objection, although such a writing is hearsay.

Moreover, Government Exhibits Nos. 22, 23, 24 and 25 are photographs of Munio Knoll, Maria, and other people in night clubs many months after the termination of the alleged conspiracy. These photographs are evidence of a hearsay nature showing that Munio and Maria were together in night clubs, and hence some of them are not properly admissible against Marcel Lutwak, and none of them is competent against Regina Treitler. In any event, the probative value of the presence together of Maria and Munio Knoll in night clubs is remote, and the photographs were prejudicial in that they conveyed to the jury the idea that these refugees were rich night-club-goers celebrating their illegal entries.

Thus, there were admitted against Regina Treitler two damaging declarations, four photographs, and the divorce decree.

There was admitted against Marcel Lutwak one declaration and two photographs.

Against Munio Knoll there was admitted the divorce decree.

In considering whether the erroneous admission of these exhibits and testimony is reversible error, the government's case against each of the defendants must be considered separately. It is submitted that, in the case of all three, to deny that the admission of these declarations and hearsay evidence was prejudicial is to vitiate the harmless error rule.

In *Krulewitch* v. *United States*, 336 U. S. 440 (1949), *a single declaration not in furtherance of the conspiracy* charged was held to be improperly admitted against the defendant. That single declaration was not considered to be harmless error.

The government here charged one overall conspiracy involving three ostensible marriages to facilitate illegal entries into the United States. Yet there is absolutely no evidence that any other defendant had anything to do with Marcel Lutwak's trip to Paris during which he married Maria. It is perfectly consistent with all the facts in the record to contend that this marriage was in no way connected with the others.

While we do not here urge that to draw the inference of one conspiracy from the evidence in the record was error, the lack of evidence connecting the Marcel-Maria marriage with any overall scheme is significant in determining what is and what is not harmless error. Cf. *Kotteakos* v. *United States,* 328 U. S. 750 (1945).

Also of significance is the fact that the testimony of the wives apart, the most important evidence came from the witnesses Haberman and Ludmer, both of whom confessed animosity toward the defendant Munio Knoll. Ludmer's wife, for example, wrote a letter to Munio Knoll threatening to expose him if he did not pay her $15,000 (R. 124-25), and although the letter was not permitted to be used to impeach Ludmer, Ludmer's hatred for the defendant Munio Knoll is clear from his testimony.

Finally, Bess Osborne, the ostensible wife without whose testimony a conviction could not have been obtained, and Maria Knoll, Munio Knoll's first wife, were accomplice witnesses. Accomplice testimony is unreliable under any circumstances, and is particularly dubious when it is remembered that these accomplices were not indicted, whereas Grace Knoll, another "ostensible" wife, who refused to cooperate with the government, was indicted.

These facts, in view of the entire record, should give rise to some hesitation before the conclusion is reached that the jury might not have been influenced by damaging declarations improperly admitted against all the defendants.

Conclusion.

This petition for rehearing has not been prepared as a routine gesture. Nor—and counsel so certify—is it intended for purposes of delay. Rather it is submitted by reason of petitioners'—and counsel's—passionate conviction that a grave injustice has been done—both to the persons involved in this case and to the principles and procedures which have made the Anglo-American legal system great.

An effort has therefore been made to express, as clearly and fully as possible, the implications of this Court's decision—not only with respect to this case itself but also with respect to the criminal law, and particularly the rules of evidence pertaining in trials of conspiracy.

With all due respect to this Court, we submit that the arguments advanced in this petition permit of only one result: *the convictions must be reversed.* And that result—we say to the Court—is a small price to pay for the preservation of rules of law basic to our finest traditions and our precious liberty.

Respectfully submitted,

ANTHONY BRADLEY EBEN,
RICHARD F. WATT,
BERNARD WEISSBOURD,
Counsel for Petitioners.

23 February 1943.

JOSEPH L. NELLIS,
DUNNING, NELLIS & LUNDIN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....
Counsel for Petitioners.

Form I-185
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
1-4-46

6703908

APPLICATION FOR ADMISSION TO THE UNITED STATES

As a Nonquota Immigrant Under the Act of December 28, 1945

and for

ALIEN REGISTRATION

MANIFEST
Sheet No. 2
Line No. 8

2

D

No. W 249970

I, the undersigned applicant for admission to the United States as a nonquota immigrant and for alien registration, being duly sworn, state the following facts regarding myself:

Name	Age
ZYGMUNT ROMANKIEWICZ	40

Last permanent residence: 79 GAMBETTA PLACE, PARIS FRANCE					Occupation: DISTILLER
Date and place of birth: 1/13/1907 KRAKOW POLAND			M ☒ F ☐	M ☐ S ☐	Name, sex, and age of accompanying children. United States citizen:
Hair: BRN	Eyes: BRN	Height: 5' 7"	Nationality: POLAND	Race: POLISH	
Marks of identification: NONE				Complexion: DARK	
Name and address of person to whom destined in United States: WIFE BESSIE BENJAMIN OSBORNE ROMANKIEWICZ 35 S. CENTRAL PARK AVE. CHICAGO ILL.					Alien (under 14):

6300

I claim to be a nonquota immigrant under the provisions of the act of December 28, 1945, and my claim is based on the following facts:

I was married to BESSIE B. OSBORNE on 11/3/47

at PARIS FRANCE My { ~~husband~~ wife } is a citizen of the United States,

Note

For lower portion of this

I claim to be a nonquota immigrant under the provisions of the act of December 28, 1945, and my claim is based on the following facts:

I was married to BESSIE B. OSBORNE on 11/3/47

at PARIS FRANCE My { husband / wife } is a citizen of the United States,

and { is now serving in / was honorably discharged from } the armed forces of the United States.

(The following facts regarding citizen spouse must be shown)

Serial No. in armed forces of United States	Rank and branch of armed forces	If honorably discharged, date thereof
704731	1st CLASS STOREKEEPER. U.S.N. PERSONNEL SECT. GREAT LAKES, ILL.	12/8/45

I have (not) been arrested or indicted for, or convicted of, any offense.

I intend to remain permanently in the United States.

I am ____ able to read and write POLISH
(Name of language)

I have had the following excludable classes explained to me, and I am not a member of any one of such classes: Paupers; professional beggars; vagrants; polygamists; anarchists; persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or the assassination of public officials, or the unlawful destruction of property, or who have ever held or advocated such views; prostitutes; procurers; persons liable to become public charges; persons previously excluded or deported or ordered deported and permitted to leave the United States voluntarily under the order of deportation; aliens ineligible to citizenship; persons [illegible] from and at the expense of the United States under the provisions of section 23 of the act of February 5, 1917; persons who [illegible] ary service.

16—48909-1

WHEREFORE, I apply for admission to the United States, and for registration under the Alien Registration Act of 1940, of myself and my above-named accompanying alien children under 14 years of age.

X [signature]
(Signature of alien)

Subscribed and sworn to (or declared) before me on

NOV 13 1947 at NEW YORK N. Y.

[signature]

U.S. Immigration Inspector
(Signature and title of officer)

STATISTICS

CONSOLIDATED 1-9-48

50 OR 464

FILED

FEB 27 1948

AT

CLERK

PORT OF NEW YORK, N. Y.

I certify that the nonquota immigrant and accompanying alien children under 14 years of age, named herein, arrived in the United States at this port on the

~~S.S.~~ OO-CBR.

on NOV 13 1947

and was inspected by me and duly { admitted under Sec. I, Act of December 28, 1945.
~~held for BSI.~~

E. O. Mansfield

Immigrant Inspector.

ACTION BY BSI	ACTION ON APPEAL

0900K-1662

FEB 26 1948

U. S. GOVERNMENT PRINTING OFFICE 16—46009-1